Supreme Court, U.S.

98 725 OCT 29 1998

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Eunice Greaser
PETITIONER

vs.

State of Missouri, Department of Corrections; Dora Schriro; George Lombardi; Sarah Schuette; Gerald Higgins; Kelly Lock; Michael Groose; Vernon Heath; Larence Bax; Cecil R. Riley; James Cregger; Bill Keeth; Robert Walling; Carl White; Phillip Higgins,
RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS - 8TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

A. Did the Eighth Circuit Court of Appeals commit error by entering Judgment as a Matter of Law for Defendant Dora Schriro, Director of the Missouri Department of Corrections, when it determined that Plaintiff/Petitioner failed to demonstrate that she suffered an adverse employment action as against Defendant Schriro when Defendant Schriro had told Plaintiff/Petitioner that she might want to resign from her position with the Missouri Department of Corrections, "before someone gets hurt."

LIST OF PARTIES

Eunice Greaser,

Plaintiff,

v.

State of Missouri, Department of Corrections;
Dora Schriro;
George Lombardi;
Sarah Schuette;
Gerald Higgins;
Kelly Lock;
Michael Groose;
Vernon Heath;
Larence Bax;
Cecil R. Riley;
James Cregger;
Bill Keeth;
Robert Walling;
Carl White;
Phillip Higgins,

Defendants.

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CITATIONS OF OFFICIAL/UNOFFICIAL REPORTS AND OPINIONS

Greaser v. State of Missouri, et al.,145 F.3d 979 (8th Cir. 1998)

STATEMENT OF JURISDICTION

This is an appeal from an Order originally entered by the Honorable William Knox, United States Magistrate Judge, on December 11, 1996. The Order denied Plaintiff's Motion for New Trial, finding that the jury verdict entered against Plaintiff/Petitioner was not against the weight of the evidence, that Missouri Department of Corrections Director Dora Schriro was entitled to Judgment as a Matter of Law in that no adverse employment action was taken by her against Plaintiff/Petitioner and that prejudicial error did not occur. The jurisdiction of the District Court was based upon 28 U.S.C. § 1343.

The cause was submitted February 12, 1998, to the United States Court of Appeals for the Eighth Circuit, and the opinion of the United States Court of Appeals for the Eighth Circuit was filed June 1, 1998. The jurisdiction for the United States Court of Appeals was based upon 28 U.S.C. § 1291.

No Motion for re-hearing was filed with the Eighth Circuit,

and a request for an extension of time to file the Petition for Writ of Certiorari to the United States Supreme Court was filed August 21, 1998. On August 27, 1998, the motion to extend time to file Petition for Writ of Certiorari was granted, up to and including October 29, 1998. The extension was granted based upon Plaintiff/Petitioner having been in a near fatal automobile accident approximately two weeks before the Petition for Writ of Certiorari was due to be filed. At that time, Plaintiff/Petitioner had planned to proceed *in forma pauperis.*

Jurisdiction is vested in the Supreme Court of the United States pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 2000e-3. Other unlawful employment practices

§ 2000e-3. Other unlawful employment practices

TEXT (a)

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

TEXT

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this sub-chapter.

TEXT (b)

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification , or discrimination; occupational qualification exception

TEXT

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization , or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin, except that such a notice or

advertisement may indicate a preference, limitation, specification , or discrimination based on religion, sex, or national origin when religion, sex or national origin is a bona fide occupational qualification for employment.

STATEMENT OF FACTS

Plaintiff/Petitioner Eunice Greaser (hereinafter "Petitioner") was first employed by the Missouri Department of Corrections (hereinafter "MoDOC") in 1980. Petitioner left her position with the MoDOC in 1984 to care for her then dying husband. Petitioner resumed working for the MoDOC in 1986 when she was hired as a Correctional Officer at the "Church Farm" facility in Jefferson City, Missouri. In 1990, Petitioner was a victim of sexual harassment by a co-worker in the MoDOC facility where she worked. Within days of the incident, Petitioner filed a formal complaint pursuant to MoDOC and State of Missouri guidelines against the offending individual, Robert Walling (hereinafter "Walling"). Ultimately, in 1991, disciplinary action was taken by MoDOC against Walling, resulting in him being demoted to Sergeant, however, within 20 months, Walling was transferred to another facility within the MoDOC and promoted back to his previous rank of Lieutenant.

At the trial on the matter, held before the Honorable William Knox, United States Magistrate for the Western District of Missouri,

Central Division, Petitioner testified that after filing her complaint with the MoDOC against Walling, she experienced adverse treatment at the hands of supervisor employees of the MoDOC. Petitioner talked with Dr. Dora Schriro, the Director of the Missouri Department of Corrections, (hereinafter "Schriro") about certain retaliations which Petitioner believed to be occurring.

These retaliations included: Petitioner being treated differently by MoDOC employees and staff after filing her grievance against Walling; Petitioner being isolated and alienated from other staff members and supervisors; Petitioner being delegated unfavorable work assignments such as working in isolation in the towers and frequently assigned to housing units; Petitioner was never assigned to work in administrative segregation, the mail room, transportation or recreation, and was repeatedly denied access to posts from which she would be able to gain knowledge of how the correctional institution runs, and was thus denied the valuable experience needed for promotion; Petitioner repeatedly requested her shift be changed from evenings to days, which was regularly denied;

Petitioner's work performance was evaluated by supervisors who only had supervisory positions over her for minimal periods; Petitioner was not given credit for certain situations she remedied during her employment with MoDOC, including: the discovery of a dangerous weapon in a cubical from which an inmate had been removed, said weapon eventually being destroyed by a supervisor; the discovery of a substance believed to be cocaine, said substance eventually being destroyed by a supervisor; the discovery of a substance believed to be "hooch" or homemade whiskey in a storage cabinet accessible to inmates, said "hooch" eventually being discarded by a supervisor; Petitioner being passed over for at least 30 job transfers or promotions within the MoDOC, even though numerous times Petitioner was more objectively more qualified than those persons finally selected for the position.

Although Schriro assured Petitioner she would look into the complaints and "get back with her," Schriro never did. At one point in time, Schriro told Petitioner she should, "resign before someone gets hurt."

In July of 1993, Petitioner filed a retaliation complaint with the Equal Employment Opportunity Commission, (EEOC). In October of 1994, Petitioner filed suit under 42 U.S.C. §1982, Civil Rights Act of 1964, and 42 U.S.C. Section 2000e-3, in the United States District Court for the Western District of Missouri, Central Division.

In the trial on the matter, the District Court granted Schriro's Motion for Judgment as a Matter of Law at the close of the Plaintiff's case, because, as District Judge Knox opined, Schriro was not employed with the Department of Corrections when the grievances were filed by Petitioner, and because the only evidence that Schriro had caused Petitioner to suffer an adverse employment action was the statement made by Schriro that Petitioner should, " resign before someone gets hurt."

The basis for Federal Jurisdiction of the Court in the first instance, the U.S. District Court for the Western District of Missouri, Central Division, was pursuant to 28 U.S.C. § 1343.

ARGUMENT

Eighth Circuit Court Of Appeals Conflicts With Other Circuit Courts Of Appeals

There is a conflict between the United States Court of Appeals for the Fourth, Fifth and Eighth Circuits and the United States Court of Appeals for the First, Seventh, Ninth, Tenth and Eleventh Circuits in regard to what is required in order for a Plaintiff in a Title VII case to show that an adverse employment action has occurred.

As the Court of Appeals for the Eighth Circuit stated in their review of the District Court's decision as to Petitioner's Motion for New Trial, to prevail on a retaliation claim under Title VII, a plaintiff must demonstrate that they have suffered an adverse employment action. *Greaser v. State of Missouri, et al.*, 145 F.3d 979 (8th Cir. 1998); *Citing: Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) In the Eighth Circuit, for an action to be considered "adverse", it must have had a materially adverse impact on the plaintiff's employment terms or conditions. *Stangler* at 1144. The District Court and the Eighth Circuit Court of Appeals concluded that the

evidence against Dr. Dora Schriro, Director of the Missouri Department of Corrections, failed as a matter of law to be an adverse employment action. **(Appendix B and C)**, *Greaser* at 985. The Eighth Circuit Court of Appeals was in error when it determined that the statement made by Schriro that Petitioner may want to, "resign before someone gets hurt," was not tantamount to an adverse employment action because the Court asserted that statement did not go towards alleging that Schriro played any role in denying Petitioner either a promotional opportunity or in denying Petitioner any incident of employment. *Greaser* at 985.

The Eighth Circuit has, in accord with decisions from the Fourth and Fifth Circuits, held that only adverse employment actions that "rise to a level of an ultimate employment decision are intended to be actual under Title VII." *Stangler* at 1144. *See: Page v. Bolger,* 645 F.2d 227 (4th Cir. 1981) *cert. denied* 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed2d 206 (1981); *Mattern v. Eastman Kodak Company,* 104 F.3d 702 (5th Cir. 1997) Ultimate employment actions "have been deemed to be either discharge or failure to hire." *Mattern v. Eastman*

Kodak Company, 104 F.3d 702 (5th Cir. 1997). There is, however, a split amongst the United States Circuit Courts of Appeal on the issue.

The First, Ninth, Tenth and Eleventh Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See: Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). The First Circuit has stated that actions other than discharge are covered by Title VII's anti-retaliations provisions, and listed as examples employer actions such as: demotions; disadvantageous transfers or assignments; refusals to promote; unwarranted negative job evaluations and toleration of harassment by other employees. *Wyatt v. City of Boston* at 15-16.

There is thus a disagreement between the Eighth Circuit Court of Appeals and other Circuit Courts of Appeals within the United States as to what is required to constitute an adverse employment

action.

The Eight Circuit, in the current matter, stated that Schriro did not, " play any role in denying plaintiff promotional opportunities or denying her any incident of employment." *Greaser* at 985. The mandate by the Eighth Circuit Court of Appeals that Petitioner show an effect on an "ultimate employment decision", is clearly in conflict with decisions of other Circuit Courts of Appeals within the United States, which have held that toleration of harassment by other employees and other acts which are adverse to intangible items will be deemed to be adverse employment actions.

As stated above, the First Circuit Court of Appeals has found the toleration of harassment by other employees tantamount to an adverse employment action. *Wyatt* at 15-16. Schriro's statement to Petitioner that Petitioner should, "resign before someone gets hurt", is a sufficient act to evidence the tolerance by Schriro of harassment by other MoDOC employees, and thus, as a matter of law, is sufficient to show an adverse employment action as against Schriro.

As there is a conflict in the law between the Courts of Appeals

for the United States, certiorari should be granted by this Court in order to resolve the conflicts between said Circuit Courts of Appeals on this crucial issue to the rights of employees.

Eighth Circuit Court Of Appeals Conflicts With Supreme Court Of United States

Even if there were a requirement, as is present within the Eighth Circuit, that the challenged action must have effected the terms or conditions of employment, retaliatory acts that create a hostile work environment should meet that standard since the Supreme Court of the United States has made it clear that terms and conditions of employment include the intangible work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-67, 106 S.Ct 2399, 91 L.Ed2d 49 (1986). As stated above, the Supreme Court of the United States has found that terms and conditions of employment include intangibles such as a hostile work environment. *Vinson* at 64-67. Petitioner can imagine no other action by Schriro which would be as an express indication of hostility or effect on the intangible work environment than the statement made by Schriro that Petitioner

should, "resign before someone gets hurt". Such a statement is evidence that a hostile work environment existed in that it was believed by Schriro that Petitioner's continued employment with the MoDOC was a threat to Petitioner's physical safety.

As there is a direct conflict in the law between the Eighth Circuit Court of Appeals decision in the present matter and a previous decision of the United States Supreme Court, certiorari should be granted by this Court in order to resolve the conflict of this crucial issue to employees between the Eight Circuit Court of Appeals and the United States Supreme Court.

Respectfully Submitted,

Date: 10/28/98

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APPENDICES

APPENDIX "A"

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1398

Eunice Greaser, *

*

Plaintiff/Appellant, *

*

v. *

*

State of Missouri, Department of *
Corrections; Dora Schriro; George *
Lombardi; Saral Schuette; Gerald *
Higgins; Kelly Lock; Michael Groose; *
Vernon Heath; Lawrence Bax; Cecil R. *
Riley; James Cregger, Bill Keeth; *
Robert Walling, *

*

Defendants/Appellees, *

*

Carl White, *

*

Defendant, *

*

Phillip Higgins, *

*

Defendant/Appellee. *

No. 97-1405

Eunice Greaser, *

*

Plaintiff/Appellee, *

v. *

*

State of Missouri, Department of *
Corrections; Dora Schriro; George *
Lombardi; Sarah Schuette; Gerald *
Higgins; Kelly Lock; Michael Groose; *
Vernon Heath; Lawrence Bax; Cecil R. *

Riley; James Cregger, Bill Keeth, *
*
Defendants/Appellants, *
*
Robert Walling, *
*
Defendant, *
*
Carl White; Phillip Higgins, *
*
Defendants/Appellants. *

Submitted: February 12, 1998
Filed: June 1, 1998

Before WOLLMAN and HANSEN, Circuit Judges, and DAVIS,[1] District Judge.

[1]The HONORABLE MICHAEL J. DAVIS, United States District Judge for the District of Minnesota, sitting by designation.

WOLLMAN, Circuit Judge.

Eunice Greaser appeals from the judgment entered by the district court[2] on the jury's verdict in favor of the Missouri Department of Corrections and various individually named employees of the Department (hereinafter referred to collectively as "the Department') in her Title VII retaliation claim. The Department cross-appeals, contending that the district court abused its discretion in denying costs pursuant to Fed. R. Civ. P. 54(d). In addition, the Department moves for revocation of Greaser's in forma pauperis status. We affirm.

I.

Greaser began working for the Missouri Department of Corrections in 1980. After serving as a correctional officer at the Renz Correctional Center for four years, Greaser left to care for her seriously ill husband. She returned to employment with the Department in 1986 as a correctional officer at the Central Missouri Correctional Center.

In 1990, Greaser was subjected to inappropriate comments made by a co-worker, Robert Walling. As a result of these comments, Greaser filed an internal sexual harassment grievance against Walling. The Department investigated the situation and, having found reason to believe Greaser's allegation, demoted Walling and transferred him to another correctional facility[3].

[2]The Honorable William A. Knox, United States Magistrate Judge for the Western District of Missouri, to whom the case was referred by consent of the parties pursuant to 28 U.S.C. § 636(c).

[3]Walling was apparently promoted to his previous rank approximately twenty months after his demotion.

After filing the grievance against Walling, Greaser continued to work for the Department until 1995. During that time, Greaser sought various promotional opportunities within the Department. Although she was a candidate for approximately thirty positions at twelve different correctional institutions and interviewed with approximately seventy Department officials regarding these positions, Greaser was not offered a promotion. As a result, Greaser began to suspect that various Department officials were retaliating against her because of her 1990 grievance and Walling's subsequent demotion. This suspicion was also based on Greaser's belief that she was being mistreated by co-workers, supervisors, and Department officials.

In light of this perceived retaliation, Greaser initiated this claim alleging that the Department had retaliated against her in violation of Title VII of the Civil Rights Act of 1964. At trial, Greaser testified that she believed that she was denied promotions, given unfavorable duty assignments, and belittled and ostracized by various fellow employees and supervisors because of the grievance she had filed in 1990. The Department offered testimony indicating that Greaser was denied promotions not for retaliatory reasons but because she interviewed poorly. At the close of Greaser's case in chief, the district court entered judgment as a matter of law (JAML) in favor of Dora Schriro and another of the individually named defendants. The case against the other named defendants was submitted to the jury, which returned a verdict in favor of each defendant. The district court denied Greaser's motion for a new trial. Shortly thereafter, the Department sought costs in the amount of $6,798.99. Greaser objected to the Department's bill of costs and requested that she be granted leave to proceed in forma pauperis. The district court rejected the Department's application for costs and ordered that the parties each bear their own costs. In addition, the court granted Greaser leave to proceed in forma pauperis.

On appeal, Greaser contends that the district court erred in denying her motion for a new trial because: (1) the verdict was against the weight of the evidence; (2) the instructions were erroneous; and (3) the verdicts were inconsistent. In addition, she challenges the district court's grant of JAML in favor of Dora Schriro. The Department cross-appeals, challenging the district court's denial of costs and seeking revocation of Greaser's in forma pauperis status.

II.

We first address Greaser's contention that the district court improperly denied her motion for a new trial. We review the denial of a motion for a new trial for abuse of discretion. See Buchholz v. Rockwell-Int'l Corp., 120 F.3d 146, 148 (8th Cir. 1997). A new trial is required only if the first trial resulted in a miscarriage of justice. See White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992). Moreover, we have recognized that inaccuracies or errors at this stage of the proceeding should not form the basis for setting aside verdicts, unless prejudicial error is shown." Buchholz, 120 F.3d at 148 (quoting Greyhound Lines- Inc. v. Miller, 402 F.2d 134, 143 (8th Cir. 1968)).

A.

Greaser first contends that a new trial is necessary because the jury's verdict was against the weight of the evidence. Where a motion for a new trial is based on such a claim, "the district court's denial of the motion 'is virtually unassailable on appeal." Keenan v. Computer Associates Int'l, Inc., 13 F.3d 1266, 1269 (8th Cir. 1994) (quoting Peterson ex rel. Peterson v. General Motors Corp., 904 F.2d 436, 439-40 (8th Cir. 990)).

The various individuals who interviewed Greaser testified that she was denied promotions not because of any retaliatory motive but because she did not interview well. These 'individuals testified that Greaser appeared to lack self-confidence and had difficulty answering the most basic of questions in a satisfactory manner. Moreover, a majority of these individuals testified that they did not know of the prior sexual harassment grievance filed by Greaser when they interviewed her or when they failed to recommend her for promotion.

Greaser would have us disregard this testimony and rely instead on her assurances to the jury that she interviewed well. She argues that the Department's claim that she interviewed poorly is entirely subjective and easy to manufacture. Thus, she asserts that such testimony is inherently suspect and must be "closely scrutinized for discriminatory abuse." O'Connor v. Penu State College, 781 F.2d 632, 637-38 (8th Cir. 1986). The duty of close scrutiny was for the jury, however, and although the jury was at liberty to disbelieve the testimony of Department officials, it was also entitled to find that testimony credible, as it apparently did.

Similarly, Greaser's other arguments are little more than an invitation to determine the credibility of witnesses, which was again a task for the jury to perform. See Manatt v. Union Pac. R.R. Co., 122 F.3d 514, 518 (8th Cir. 1997), cert. denied, 11 8 S. Ct. 697 (1998). We conclude that the jury's verdict does not constitute a miscarriage of justice and that the district court did not abuse its discretion in denying the motion for a new trial.

B.

Greaser also asserts that she is entitled to a new trial because the district court improperly instructed the jury. Jury instructions are a matter generally within the broad discretion of the district court. See Ryher v. KARE 11 108 F.3d 832, 845-46 (8th Cir. 1997) (en banc), cert. denied, 117 S. Ct. 2510 (1997). We will reverse only if the instructions, when viewed in their entirety, contain "an error or errors that affected the substantial rights of the parties." Id. at 846 (quoting Hasting v. Life Ins.Co., 975 F.2d 506, 510 (8tli Cir. 1992)). The instructions need not be technically perfect or even a model of clarity. See id. Furthermore, the fact that a trial court erred in giving or not giving a particular instruction to the jury does not automatically entitle a party to relief, the error must be prejudicial. See Stockmen's Livestock Market, Inc. v. Norwest Bank of Sioux City. N.A., 135 F.3d 1236, 1246 (8th Cir. 1998).

Greaser concedes that she made no objection to the instructions. Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 5 1. The purpose of this rule "is to compel litigants to afford the trial court an opportunity to cure [a] defective instruction and to prevent litigants from ensuring a new trial in the event of an adverse verdict by covertly relying on the error." Dupre v. Fru-Con Engineering. Inc., 112 F.3d 329, 333 (8th Cir. 1997) (quoting Missouri Pac. R.R. v. Star C4 Gravel Co., 592 F.2d 455, 459 (8th Cir. 1979)). Thus, where no adequate objection is made to preserve a purported error in instructions, we review for plain error only. Plain error review is "narrow and confined to the exceptional case where error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings." Ryher, 108 F.3d at 847 (quoting Des Moines

Bd. of Water Works Trustees v. Alvord, 706 F.2d 820, 824 (8th Cir. 1983)). Having reviewed the challenged instructions, we conclude that no such error occurred here. See Ryher, 108 F.3d at 847.

C.

Greaser also contends that she is entitled to a new trial because the jury rendered inconsistent verdicts. The morning following trial, the district court held an unrecorded telephone conference call during which the court apparently told the parties that certain members of the jury had expressed sympathy for Greaser. Greaser claims that these statements by members of the jury constitute a "special verdict" that is inconsistent with the general verdict returned by the jury. No record of the conference call exists, however, and thus we have no way to review this issue. See Schmid v. United Bhd. of Carpenters & Joiners, 827 F.2d 384, 386 (8th Cir. 1987).

III.

As her final point on appeal, Greaser challenges the district court's grant of JAML in favor of Dora Schriro. We review a district court's grant of JAML de novo, applying the same standard as that employed by the district court. See Manning v. Metropolitan Life Ins. Co.. Inc., 127 F.3d 686, 689 (8th Cir. 1997). We resolve all doubts in favor of the nonmoving party and give that party the benefit of all reasonable inferences. See Brown v. United Missouri Bank, N.A., 78 F.3d 382, 387 (8th Cir.1996). "We will affirm a grant of JAML where the nonmoving party has presented insufficient evidence to support a jury verdict in [her] favor." Manning, 127 F.3d 689-90.

To prevail on a retaliation claim under Title VII, a plaintiff must demonstrate that she suffered an adverse employment action. "Although actions short of termination may constitute an adverse employment action within the meaning of the statute, 'not everything that makes an employee unhappy is an actionable adverse action.'" Id. at 692 (quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997)). "Otherwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996) (quoting Williams v.

Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)). Rather, for an action to be considered adverse, it must have had a materially adverse impact on the plaintiff's employment terms or conditions. See Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997).

We conclude that the evidence against Schriro fails as a matter of law to demonstrate an adverse employment action. Greaser contends that Schriro, who became director of the Central Missouri Corrections Center in 1993,, improperly handled grievances that Greaser filed in 1993, 1994, and 1995, and that Schriro's failure to do so constituted an adverse employment action. However, Greaser is unable to point to any evidence supporting this allegation. The e evidence shows that Schriro undertook to have the grievances investigated. Although Greaser takes issue with the conclusions Schriro reached, she has produced no evidence indicating that Schriro's conclusions were tainted by some impermissible motive or ungrounded in fact.

Greaser contends that two separate statements made by Schriro evidence an adverse employment action. First, Greaser alleges that when she approached Schriro about the status of her grievances, Schriro (apparently believing that Greaser was near tears) asked Greaser if she would like a facial tissue. Greaser interpreted this statement as a sarcastic barb regarding Greaser's propensity to complain. Second, Greaser contends that Schriro at one point told her she might want to resign "before someone gets hurt."

We conclude that these two statements do not rise to the level of adverse employment action. Greaser does not allege that Schriro played any role in denying her promotional opportunities or in denying her any incident of employment. Likewise, Greaser failed to produce any evidence indicating that the statements were even remotely linked to Greaser's 1990 grievance against Walling.

IV.

On cross-appeal, the Department argues that the district court abused its discretion in denying costs pursuant to Fed. R. Civ. P. 54(d), which provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court

otherwise directs." This rule represents a codification of the "presumption that the prevailing party is entitled to costs." Bathke v. Casey's General Stores. Inc., 64 F.3d 340, 347 (8tli Cir. 1995). Despite this presumption, however, the district court has substantial discretion in awarding costs to a prevailing party. See Zotos v. Lindbergh School Dist., 121 F.3d 356, 363 (8th Cir. 1997). We review the district court's denial of costs for abuse of discretion. See Milton v. City of Des Moines, 47 F.3d 944, 947 (8th Cir. 1995).

There is no dispute that the Department is a "prevailing party" within the meaning of Rule 54(d). The Department argues that, because of the presumption favoring an award of costs to tl-ie prevailing party, the district court's discretion to deny costs is narrow and that costs should be denied only if there is some misconduct or other action worthy of penalty on the part of the prevailing party.

As we held in Hibbs v. K-Mart Corp.. 870 F.2d 435, 443 (8th Cir. 1989), however, this argument "overlooks the fact that ... Fed R. Civ. P. 54(d) [is] phrased in permissive terms." Id. at 443. See also Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987) ("Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party"). We are satisfied that the district court did not abuse its discretion in denying costs in the circumstances of this case.

V.

Finally, the Department brings a motion seeking revocation of Greaser's in forma pauperis status. The in forma pauperis statute, 28 U.S.C. § 1915, is designed to ensure "that indigent persons will have equal access to the judicial system." Attwood v. Singletary, 105 F.-'Id 610, 612 (11th Cir. 1997). The decision of whether to grant or deny in forma pauperis status under section 1915 "is within the sound discretion of the trial court" and is reviewed for abuse of discretion. Cross v. General Motors Corp., 721 F.2d 1152, 1157 (8th Cir. 1983).

The Department contends that Greaser is not indigent and that her affidavit filed in support of her motion for leave to proceed in forma pauperis is at best incomplete and at worst blatantly false. In support of this contention, the Department points out that Greaser's

affidavit failed to reveal that her husband had earned in excess of $10,000 during the first three quarters of 1997, stating instead that her husband was unemployed." Thus, the Department contends that revocation of Greaser's in forma pauperis status is mandated by 28 U.S.C. § 1915(e)(2), which provides, in part:
"[T]he court shall dismiss the case at any time if the court determines that -- (A) the allegation of poverty is untrue."

The inaccuracies cited by the Department were brought to the district court's attention. The court was therefore aware that Greaser's financial resources were understated in her affidavit, but nevertheless found that she was indigent. We conclude that this finding was not clearly erroneous and that the decision to grant in forma pauperis status to Greaser was not an abuse of discretion. @ Cross. 721 F.2d at 1157,

The judgment is affirmed. The Department's motion to revoke Greaser's in forma pauperis status is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

EUNICE GREASER,)
)
Plaintiff,)
)
v.) No. 94-4426-CV-C-66BA
)
STATE OF MISSOURI, et al.,)
)
Defendants.)

ORDER

Following a jury verdict in favor of defendants, plaintiff filed a motion for new trial. Plaintiff asserts the verdict is against the weight of the evidence, there were errors in the jury instructions, and the court improperly granted defendant Schriro's motion for judgment as a matter of law at the close of plaintiff's case. Defendants responded in opposition to plaintiff's motion.

"Generally, new trials are granted only if the record presents prejudicial error or substantial justice has not been done." *Comerio v. Beatrice Foods Co.*, 616 F. Supp. 1423, 1428 (E.D. Mo. 1985); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2808 at 32 (1973). *See also Sifers Corp. v. Arizona Bakery Sales Co.*, 133 F.R.D. 607 (1991). The burden of demonstrating the verdict was against the weight of the evidence or showing prejudicial error is on the moving party. *Comerio*, 616 F. Supp at 1428.

Here, plaintiff has not met her burden of showing the verdict was against the weight of the evidence or that prejudice error occurred.

THEREFORE, IT IS ORDERED that plaintiff's motion of November 8, 1996, for a new trial is denied. [253]

Dated this 11th day of December, 1996, at Jefferson City, Missouri.

William A. Knox

WILLIAM A. KNOX
United States Magistrate Judge

DOCUMENT # 260

APPENDIX "C"

MR. RINER: No, I think we've taken up everyone.

MR. BORBONUS: Yeah.

THE COURT: Oh, I'm sorry. We did take up Walling, okay. I will get you my answer on Higgins, Lombardi and Schriro when we come back from lunch.

(Off Record Talking)

THE COURT: Laura, go off the record.

(Court in Recess at 11:40 a.m. until 12:35 M.)

OUT OF THE PRESENCE OF THE JURY

THE COURT: You may be seated. It seems to me that the only evidence against Dr. Schriro is plaintiff's testimony that sometime in 1995, Dr. Schriro said something like why don't you quit before someone gets hurt. Given the fact that Dr. Schriro was not even an employee of the Department of Corrections or the State of Missouri in '90 when this all occurred and other evidence connecting her to the grievance involving Walling and the other evidence in the case against Dr. Schriro I'm going to grant the defendant's motion for judgment on behalf of Dr. Schriro. It will be denied as to Mr. Higgins and Mr. Lombardi. Go ahead and

bring the jury in. What's our schedule look like at this stage? Will we get all the evidence in tomorrow?

MS. INGERSOLL: Pardon?

THE COURT: Will we get all the evidence in tomorrow? Today and tomorrow?